IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

M. A. ELLIS, Appellant, vs. J. L. REED, Appellee.	Error to District Court of Alaska, Third Division. Hon. Fred M. Brown, Judge.

Brief For Appellant

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THE FACTS.

Oct. 25, 1909, Eri Thompson, being the owner of the Battle Axe mining claims, on Thunder Creek, in Cook Inlet mining and recording District, in Alaska, conveyed the same by deed to J. M. Cummings, the deed covering other property (a saloon and certain buildings in Susitna) not involved in this case. On Dec. 7, 1911, Cummings sold this mining claim under an optional contract to Al Harper, who in turn transferred this contract to M. A. Ellis, four days later,

on Dec. 11, 1911. This contract called for the payment of $4,000 Jan. 15, 1912, $3,000 July 15, 1912, and $3,000 Sept. 1, 1912. These payments were duly made by Ellis in cash, but not on the exact dates called for, the first being made in February, 1912, the second in August 1912, and the last in Feb., 1913, and he received a deed for the property from Cummings on Feb. 28, 1913. Ellis is then before this court as a *bona fide* purchaser for full value of this property subject only to such liens as the law imposed upon the land at the time of his purchasing.

At the time of Ellis' purchase a decree had been entered by the District Court declaring a certain judgment a lien upon this property, and an appeal therefrom to this Circuit Court of Appeals was pending. On April 25, 1910, J. L. Reed (the same person who is plaintiff in this case) had recovered a judgment, upon claims assigned to him, for $1598.80 and costs against Eri Thompson and Dave Wallace, on which execution was issued and returned *Nulla Bona,* and a transcript of the judgment filed in the office of the recorder of the Cook Inlet District, May 22, 1910, at 11:10 p. m. the last act making it a lien, under the laws of Alaska, on all realty within the District. On the same day the deed first above described from Thompson to Cummings had been recorded at 8:30 p.

m. having been withheld from the time of its making, Oct. 25, 1909. The decree of the District Court found the deed from Thompson to Cummings void as to the creditors of Thompson, and declared Reed's judgment a valid lien upon the property. Ellis had the title examined by his attorney, S. O. Morford, who had procured an abstract, and finding this defect it was protected against by leaving $2,500 of the first payment of $4,000 in Morford's hands to discharge the judgment in case it should finally be sustained as a lien upon the property. Ellis promptly took possession of the mining claim and began to work it and has done so ever since. When the decree was affirmed by this court, Morford paid the judgment out of the money left in his hands. Such is the title of Ellis as an innocent purchaser for value, and he is entitled to be protected to the fullest extent.

Now let us look at the facts constituting the plaintiff's claim. In August, 1912, William Snook and Karl Karlson commenced suits against Thompson and Wallace for labor performed in 1907 on the Battle Axe mining claim. J. L. Reed was substituted as plaintiff in the Karlson suit and recovered judgment July 14, 1914 for $882.30 and costs, and on the same

day Snook recovered judgment for $582.30 and costs and such judgment was assigned to Reed. These judgments were rendered, in fact the suits were started long after Ellis had purchased the land, and was in possession of the same and working it. On September 22, 1912, attachments were issued in these two suits, and levied upon the mining claim in controversy by the posting of notices of levy upon the land in question. In reference to the creation of liens upon realty by the levy of attachments, the Compiled Laws of Alaska, Sec. 974, provide as follows:

"If real property be attached, the marshal shall make a certificate containing the title of the cause, the names of the parties, a description of such real property, and a statement that the same has been attached at the action of the plaintiff, and the date thereof. Within ten days from the date of the attachment, the marshal shall deliver such certificate to the commissioner as ex-officio recorder of the recording district in which said real property is situated, who shall file the same in his office and record it in a book to be kept for that purpose. When such certificate is so filed for record the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but if filed afterwards it shall only attach, as against third persons, from the date of such subsequent filing."

No certificates of attachment were ever filed in the

recorder's office of the District in which the land was located, and so the attachments never became liens upon the land.

It was sought to charge the purchaser Ellis with actual notice of the attachments, but the proof failed dismally on that subject. Ellis did not know what was the nature of the suit, subject to which he bought, save that it was to assert a claim for wages. In 1912, long after he had bought the land, made his first payment of $4,000, and was in possession and working the same, one of the claimants, Snook, wrote Ellis stating he had a claim for wages and asking how he (Ellis) was to pay for the land. Ellis wrote to him telling him the facts and advising him to bring suit to protect himself. A man who was on the land after the attachments were levied told Ellis about the posting of some notice but could not tell what it was except it was some kind of a suit against Thompson and Wallace. Thereupon Ellis promptly wrote to the Recorder who informed him that nothing had been filed against his land. His lawyer, Morford, was also informed about it, and also wrote to the Recorder and received the same information. On such evidence the court held that Ellis had actual notice of the claims of Snook and Karlson, and that they became charges upon the

land without any compliance with the statute regulating the lien of attachments.

ASSIGNMENT OF ERRORS.

I.

The Court erred in entering a decree holding the deed from Thompson to Cummings void as to creditors.

II.

The Court erred in declaring the judgment of Reed upon the claims of Snook and Karlson to be liens upon the land involved in this case.

III.

The Court erred in not dismissing the action at plaintiff's cost.

ARGUMENT.

I.

THE PLAINTIFF HAS NO STANDING IN COURT TO BRING THIS SUIT.

This is a creditor's bill brought by Reed,

the holder of two judgments against Thompson to subject to the lien of those judgments certain land which Thompson had conveyed to one Cummings, and Cummings had conveyed to the defendant Ellis, who was an innocent purchaser for value, and took immediate possession of the land upon purchasing the same. Reed can not claim that the judgments themselves are any charge upon the land because the judgments were not rendered until long after Ellis had fully performed all the terms of his contract to purchase *and received a deed to the property from Cummings,* consequently Reed seeks to have these judgments declared liens upon the land by virtue of attachments issued and levied upon the land at the beginning of the suits in which the judgments were obtained. These suits were not begun until long after Ellis had purchased the property, paid large sums of money thereon, and taken possession thereof. The returns of the officer show the attachments to have been levied upon the land by posting of notices thereon, but no certificates of such levies were filed in the office of the recorder of the Mining District as required by the statute above set forth to make the levies of such attachments liens upon the land, and notices to third persons. Liens of this character

were wholly unknown to the common law and can only exist by virtue of a strict compliance with the statutes creating them. It is an elementary principle of law that where such liens are to be created in a certain method prescribed by statute that the provisions of the statute must be literally followed and otherwise no lien can come into existence and attach to the property. This is the rule of construction always applied, even where the language of the statute only prescribes a procedure without stating that it shall be the sole means of accomplishing the result. But in this case the statute expressly negatives the acquiring of a lien in any other possible manner by stating that such lien "Shall *only* attach, as against third persons, from the date of such subsequent filing." The very law which creates these liens expressly negatives the idea of the Court supplying any substitute therefor. The Court's holding that actual knowledge by Ellis of the rights upon which Reed might have obtained the liens, if he had followed the method provided by statute, excuses Reed from following the statutory method and still gives him a lien, is certainly far fetched. It is not possible to find any authority that a Court of Equity under its powers can create a "Near Lien" as a substitute for a "Real Lien" which shall have equal

vitality. Therefore Reed by virtue of his attempts at attachments obtained no liens upon the property nor any specific interest therein, regardless of the fact that even if he had, it would have been subject to the previously acquired rights of Ellis, an innocent purchaser for value without notice. As Ellis never came in contact with or had any dealings of any nature with Reed or his assignors in connection with the subject matter out of which arose the causes of action upon which the judgments were based, there was absolutely no privity between them and no facts existed out of which a Court of Equity could create a claim against the land belonging to Ellis at the time the suits were started. The judgments are not against Ellis but against the grantor of Ellis's grantor. The plaintiff Reed has therefore no claim of any kind against Ellis personally, nor any specific interest in the land in question which he can enforce in this suit.

II.

THE JUDGMENTS DECLARED IN THIS SUIT TO BE LIENS UPON THE PROPERTY ARE NULLITIES.

At the time of the bringing of the suits upon the claims of Snook and Karlson, now owned by Reed,

the defendants to those actions, Thompson and Wallace, were both outside of Alaska and no personal service of process upon them was had within the territory. Therefore, as judgments *in personam* against Thompson and Wallace they are absolute nullities. As actions *in rem* these judgments are also invalid. The *rem* in this case was the real estate in question. The Court had no jurisdiction to bring in the defendants constructively by publication until it had obtained jurisdiction over the *rem* in such manner as the laws of Alaska provided, and until that was done the proceedings would not be due process of law. Now the statutes of Alaska expressly provided that attachments on real property should be levied by the officer's posting notices upon the property and then he is commanded by the statute, which we have quoted at length, to make out a certificate showing the levy he has made, and within ten days deliver the same to the recorder to be filed. The statute provides that when such certificate is filed the lien of the attachment shall become fastened on the land from date of issue of the attachments and that in case such certificate is filed more than ten days after the levy it shall only become operative from the date of filing. This filing of the certificate is just as necessary a step for the Court to impress

its attachment upon the land and thus bring the land before it, as the posting of the notice. The marshal having failed to file any such certificate never took the steps necessary to bring the land before the Court and within its control. Therefore no *rem* was before the Court, jurisdiction over which would form a proper basis for constructive service upon the defendants so as to bind their interest in the land. These judgments therefore were absolute nullities as to both Thompson and Wallace. And if they were not binding upon those who were actually parties, how much less can they bind the interest of persons who, like Ellis, were not even nominally made parties to the suits. Moreover, the legal title to the land had for more than two years been out of Thompson, the defendant in such action, and in one J. M. Cummings, who was not made a defendant to such actions, and during the latter portion of that time the same was in the actual possession of Ellis as a purchaser, and his possession was notice to the world of his rights.

III.

NO EVIDENCE WAS OFFERED ON WHICH TO SET ASIDE THE DEEDS FROM THOMPSON TO CUMMINGS, AND CUMMINGS TO ELLIS.

In order to declare the judgments in question a lien upon the land it was necessary for the Court below and it did find and decree that the deed from Thompson to Cummings was made in fraud of Thompson's creditors, and that Ellis obtained his contract and deed with notice of such fraud. Passing by for the moment the question of notice to Ellis, which we take up later, we insist that there was not one scintilla of legal evidence offered in this case to show that the deed from Thompson to Cummings was fraudulent. Not a witness testified to any facts tending to show such fraud nor were any documents of any kind offered to establish such fact except the decree in the case of Reed vs. Thompson in the action where the District Court entered a decree, afterwards affirmed by this Court, finding the deed from Thompson to Cummings voidable by creditors and adjudicating a certain judgment to be a lien upon the land. When this decree was offered in evidence it was objected to, and when it was admitted an ex-

ception was taken. When Ellis was about to become a purchaser of the property in question he was chargeable with notice of this decree declaring this lien, because the same appeared upon the records, but he was only chargeable with knowledge of it in so far as the relief which it granted affected the title to the land he was buying. How it was obtained he was not chargeable with, as he was not either a party or a privy to the action. The relief granted by the Court was all that concerned him and the facts passed upon by the Court in arriving at conclusions in no manner concerned him. Any judgment or decree is binding only on those who are before the Court. It is true that the decree in this case, in general language, declared the deed from Thompson and Cummings void as against the creditors of Thompson, but the declarations of a decree or judgment are but empty language as against all save those who are before the Court. It can not possibly be claimed that Ellis was in any manner a party to or bound by this decree so that the same would be *res judicata* as to him in reference to any fact that the Court decided or passed upon, except the relief it granted which would affect property he was about to purchase. This Court in its opinion in that case states that the evidence upon which the decree is based is rather

dubious, but still sufficient so that the Court would not disturb the finding of the trial judge. There could be no better illustration of the reason for the doctrine of *res judicata* than this case. Had Ellis been present at the trial of that case and interested therein the result might have been entirely different, but he never had his day in Court in that proceeding, and what was there done is certainly not binding on him in this proceeding, and still that decree *inter alios* is the only evidence offered in this case against Ellis to establish fraud in the making of the deed by Thompson to Cummings. At first glance, as Reed appears to be the plaintiff in both cases, it might appear as though there was some connection between the two, but in each case he was the assignee of the claims of other persons who had no connection with each other. If this Court will read the opinion of the trial judge in this case it will see at a glance that the whole of his decision is based upon the erroneous conception that there was some similarity between the facts in the case where the judgment was obtained on which the first suit was brought to set aside the deed, and the facts in the cases in which the judgments were rendered on which the deed was set aside in the case at bar. In reality there is no resemblance whatever. Thompson and

Wallace are the defendants named in both cases. Reed is the nominal plaintiff in both, but he is the assignee of the claims of different persons, who had absolutely no connection with each other. In the first case a judgment was obtained against Thompson and Wallace based upon personal service of process within the jurisdiction of the Court. In the second case no actual service was ever had upon them, nor was the constructive service against them valid because the *rem* involved in the action had not been brought before the Court in the statutory manner. In the first case the judgment declared to be a lien upon the land was undisputedly a valid lien because it was a final judgment, and by force of the statute became a lien, as soon as filed with the recorder, upon property in the district. In the second case there is no lien upon the land in question because the attachments upon which it was supposed to be predicated were never made liens in accordance with the provisions of the statute. In the first case it was sought to have the deed from Thompson to Cummings held invalid as against the parties to the instrument. In the second case it is sought to have that deed and the other deed from Cummings to Ellis held invalid as against an innocent purchaser for value.

IV.

ELLIS HAD NO KNOWLEDGE NOR NOTICE OF ANY RIGHTS OF SNOOK AND KARLSON OR THEIR ASSIGNEE, REED.

As we have above shown, Ellis did not at the time of his purchase have any legal record notice of the existence of any right of Snook and Karlson, whose claims are represented by the judgments which Reed obtained as their assignee, and which have in the case at bar been declared a lien upon the land. The Court below held that he had actual knowledge of such rights, which was certainly an erroneous finding. If he had had knowledge it would not in any manner have affected his rights, because he would have a personal right to rely upon the public records as he found them, and was not bound, even if he had knowledge thereof, to pay any attention to these men's claim for wages, and thus become chargeable with notice of suits *which they might afterwards bring*. We request this Court to read the testimony of Ellis and his attorney, Judge Morford, in full, as it appears in the transcript, and the Court will become satisfied that Ellis never had any knowledge of any claims against the property which he was pur-

chasing, and that even when he afterwards heard of legal proceedings both he and his attorney promptly exercised the highest diligence in order to protect him against such proceedings. There is not a scintilla of evidence that Ellis knew anything about or ever heard of Snook and Karlson and their claims at the time he bought this property, paid his money upon it and took possession. His is the only testimony upon the subject. Any Court that will read his evidence will believe his statements absolutely, for he was a fair and frank witness, who stated without hesitation just what he knew, however much it might militate against him. In reference to the decree of Court declaring Reed's first jugdment a lien upon the land he states that he only knew that there were some claims for wages which it was claimed were chargeable against the land and that sufficient of the first money paid by him was deposited with Judge Morford to protect against such claims. He left the matter to his attorney and knew nothing of the personality of the parties nor the basis of their rights except that they were claims for wages.

After he had bought the land and taken possession thereof Snook wrote him a letter and told him he had a claim for wages for work done upon the land. Ellis, knowing that there was money to cover

similar claims but knowing nothing of the details, wrote and told Snook about the matter and advised him to start proceedings to protect his rights. Ellis went further than that, and in a frank, honest and generous way, he told Snook how he was obligated to pay for the land and gave him such information that if Snook had been diligent he could have begun action promptly and got his money by garnishment. The fact is that the claims of Snook and Karlson could both have been collected if Reed when he started the suits for their claims had garnished the balance of the unpaid purchase price remaining in Ellis's hands, but Reed as a lawyer bungled the matter and instead of going after the cash saw fit to try and make a levy of attachments upon the land in suits against Thompson, when he well knew that Thompson had not had any interest in the land for some years. The money in Ellis's hands could have been easily reached but as long as steps were not taken Ellis had to apply it where his contract called for. Certainly this statement of Snook to Ellis that he had a claim for wages for work done on the property and asking Ellis to give him information to help him collect his claim did not throw the burden of paying that claim upon Ellis or make it a lien upon the land. It would indeed be a simple matter if who-

ever did work connected with certain land could obtain a lien upon such land by going around and telling a man who had purchased it that such a claim existed; and still it is by such means that the Court below charges Ellis with knowledge of defective attachments subsequently sued out and assumes to make that knowledge take the place of compliance with statutory requirements. The next information received by Ellis was when a man who had been to the land told him that there were notices stuck up on the land showing some kind of a law-suit against Thompson and Wallace but not informing him that they were attachment notices or what their exact nature was. The law provided that if attachments were levied, then within ten days after such attachments were levied certificates of levy must be filed in the recorder's office. Ellis, with little knowledge of the subject except that the recorder's office was the place to find out about titles of land, wrote to the recorder and received an answer that there was nothing against the land on the records, and in doing this he showed the highest degree of diligence. He communicated his information about these notices on his land to Judge Morford, and this gentleman also wrote to the recorder and received the same information. Both exercised the highest degree of

diligence to ascertain if there was anything that would injure Ellis's title to the land, while Reed in failing to have the marshal file certificates of levy was guilty of the grossest negligence. Two years afterwards, in July, 1914, Reed procures judgments on the Snook and Karlson claims, and then for the first time by the starting of the case at bar Ellis is informed of what the Snook and Karlson claims are, that they had obtained judgment on them, and had made a defective attempt to levy upon his land, but had negligently failed to complete their levies, so that when he had made inquiry he could not find out about them. The evidence in this case shows the grossest kind of negligent bungling on the part of Reed in conducting his case. First, with the knowledge he had he should have garnished the last payment which Ellis would have had to make, and second, having chosen to attach he should have seen to it that the attachments were legally made.

We have been arguing this matter upon the theory that it would have made some difference if Ellis had had knowledge or notice of these claims and proceedings. But we wish to again emphatically insist that even if he had it could not have affected him as a previous innocent purchaser for value. The Court below in his opinion throws upon Ellis the

duty of inquiry to find out about claims of which there is no trace upon the records, and excuses Reed for the grossest negligence. The evidence of Ellis and Morford affirmatively shows that they did not have any knowledge or notice of the claims of Snook and Karlson or their assignee, Reed.

V.

THE TRIAL COURT'S HOLDINGS.

In effect the Court below has held the following propositions:

1. That a statutory lien can be created without complying with the statute.

2. That the findings of a decree are binding on a person who is neither a party nor a privy to the suit.

3. That a person by writing a letter to one who has purchased land and informing the purchaser that he has an unliquidated claim against the previous owner, can acquire a lien upon the land to secure his claim.

4. That the owner of land who examines the records where by law claims against land should be

shown and finds none, will not be protected by such examination.

5. That judgments spread upon the records of a court which show that neither person nor property had been brought before the court by legal process are nevertheless valid and effective.

6. That a bona fide purchaser, for value, and without notice, will not be protected.

CONCLUSION.

We have not cited any authorities to the Court, because all the propositions of law that we have invoked are elementary, and the Judges of this Court have enunciated them so often that it would be impertinent to assume lack of familiarity with them. It is only a matter of their application to the facts shown in this record. We insist that this cause should be reversed and remanded with instructions to dismiss the suit.

Respectfully submitted,

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